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Dennis Lee Thian Poh & Ors v Dr Michael Samy & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2844–11 OF 2011

SYED AHMAD HELMY, ABDUL WAHAB PATAIL AND ABDUL AZIZ ABD RAHIM JJCA

11 DECEMBER 2012

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Civil Procedure — Appeal — Interference by appellate court — Judicial appreciation of evidence — Whether trial judge failed to consider pleadings in toto — Whether trial judge erred in finding that appellants failed to prove their case as pleaded — Whether appellate interference warranted

D

Evidence — Conflicting evidence — Findings of trial judge — Whether trial judge correct in assessment of evidence

E

On 4 November 2000, Hoh Pau Yu ('the deceased') was admitted to the labour ward of the hospital operated by the second respondent. The deceased was attended to by the first respondent, the consultant obstetrician and gynaecologist having his practice in the second respondent hospital. The deceased had agreed to the first respondent's suggestion to induce labour by

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inserting 100mg of a drug known as Cytotec. The first respondent also hastened the process of labour by artificially rupturing the amniotic fluid sac and inserting a further 50mg of the same drug. Delivery occurred but the deceased suffered greater than average degree of blood loss that led to her collapse. The deceased was then transferred to the intensive care unit for

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resuscitation and an emergency hysterectomy was performed. However, despite these efforts the deceased died. The husband and children of the deceased ('the appellants') commenced an action in the tort of negligence against the respondents. The plaintiffs claimed that the deceased's demise was caused by postpartum haemorrhage in the course of induction or excessive

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bleeding due to a uterine tear and that the first respondent was in breach of the duty of care he owed to the deceased, with a further claim that the second respondent was vicariously liable for the first respondent's acts or omissions. At the end of the trial, the trial court found that the appellants had failed to prove their case as pleaded, failed to establish that the first respondent ought to have

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warned the deceased of any material risk of using Cytotec and failed to establish that the second respondent had breached the applicable standard of care for private hospitals in Malaysia or that it was vicariously liable. Consequently the appellants' claim was dismissed with costs. This was the appellants' appeal against that decision. In their appeal the appellants submitted that if the trial

judge had appreciated the precise allegations made against the first respondent she would have concluded differently. A

Held, dismissing the appeal:

(1) While pleadings should be read as a whole, they ought to be written to disclose clearly and systematically the facts for the respective causes of action relied upon by the appellants. Instead of setting out the causes of action relied upon distinctly, and under each cause of action setting out the facts relied upon, the pleadings in the present case were set out like a story leading to a claim. This led to the trial court not being able to have a clear appreciation of the causes of action and the facts relied upon, especially when the parties themselves disputed what was pleaded. The trial judge should consider all the pleadings objectively and could not be expected to dismiss some parts as mere generalities and concentrate on other parts as suits the purposes of one party or another (see paras 16–18). B C D

(2) When submitting on whether the first respondent ought to have given a warning on the use of Cytotec, the appellants sought this court to imagine the first respondent giving advice to the deceased. That was speculation and it was not for the court to imagine upon any hypothesis. Instead a court's consideration was confined to an appreciation of the evidence adduced (see para 20). E

(3) The trial judge was entitled to make the finding that there was no evidence of any material risk associated with the use of Cytotec for induction of labour. There was conflicting evidence as to whether there was any material risk, and the trial judge after having heard the witnesses made her finding. It would be an interference with the jurisdiction of the trial court to alter that finding unless it could be shown that the finding was in contradiction of an undisputed fact or evidence, which the appellants had failed to do (see para 21). F G

(4) The trial judge's finding on the subject of blood loss was also based on the conflicting evidence before her. The trial judge had considered the facts, the evidence on the disputed facts and the submissions before making her finding. There was no material error as would warrant an intervention to correct an injustice (see para 23). H

(5) There was no obvious flaw in the consideration and reasoning by the trial judge on the question of whether the cause of death was amniotic fluid embolism or post partum haemorrhage that would warrant a finding that she had erred (see para 24). I

(6) Although the second respondent was sued on the grounds that it had failed to provide the standard of services expected of a private hospital, there was no evidence proffered of any standards to enable a fair and just

A determination of what was the accepted standard of services and services of a private hospital (see paras 25–26).

[Bahasa Malaysia summary

B Pada 4 November 2000, Hoh Pau Yu ('si mati') telah dimasukkan ke wad bersalin hospital yang dikendalikan oleh responden kedua. Si mati dirawat oleh responden pertama, perunding obstetrik dan pakar sakit puan yang beramal di hospital responden kedua. Si mati telah bersetuju dengan cadangan responden pertama untuk mengurangkan kesakitan bersalin dengan mengambil 100mg C ubat yang dikenali sebagai Cytotec. Responden pertama telah mempercepatkan proses bersalin dengan memecahkan pundi cecair amnion secara sendiri dan memasukkan 50mg lagi ubat tersebut. Si mati melahirkan anak tetapi telah mengalami kehilangan darah yang banyak melebihi purata tahap kehilangan darah yang biasa, menyebabkannya tidak sedarkan diri. Si D mati kemudiannya dipindahkan ke unit rawatan rapi untuk bantuan pernafasan dan histerektomi kecemasan kemudiannya dijalankan. Walau bagaimanapun, dengan usaha-usaha ini, si mati meninggal dunia. Suami dan anak-anak si mati ('perayu') memulakan satu tindakan dalam tort kecuaian terhadap responden. Plaintif mendakwa bahawa kematian si mati disebabkan E oleh pendarahan selepas bersalin semasa induksi atau pendarahan yang berlebihan akibat koyakan pada rahim dan bahawa responden pertama telah melanggar kewajipan berjaga-jaga pada si mati, dengan mendakwa lagi bahawa responden kedua secara tidak langsung bertanggungjawab bagi perbuatan atau ketinggalan responden pertama. Di akhir perbicaraan tersebut, mahkamah F perbicaraan mendapati bahawa perayu-perayu telah gagal membuktikan kes yang mereka plidkan, gagal untuk membuktikan bahawa responden pertama sepatutnya telah memberi amaran kepada si mati mengenai apa-apa risiko material dengan mengambil Cytotec dan gagal untuk membuktikan bahawa responden kedua telah melanggar standard berhati-hati yang terpakai kepada G hospital-hospital swasta di Malaysia atau bahawa ia bertanggungjawab secara tidak langsung. Oleh itu, tuntutan perayu ditolak dengan kos. Ini adalah rayuan perayu-perayu terhadap keputusan tersebut. Dalam rayuan ini, perayu-perayu menghujahkan bahawa sekiranya hakim bicara telah mempertimbangkan dakwaan yang dibuat terhadap responden pertama secara tepat, beliau akan membuat kesimpulan yang berbeza. H

Diputuskan, menolak rayuan:

(1) Walaupun rayuan hendaklah dibaca secara keseluruhan, ia harus dirangka untuk mendedahkan dengan jelas dan sistematik fakta bagi I setiap kausa tindakan yang disandarkan oleh perayu. Pliding-pliding dalam kes ini dinyatakan seperti sebuah cerita yang membawa kepada tuntutan sedangkan kausa-kausa tindakan sepatutnya dinyatakan secara jelas dan di bawah setiap kausa tindakan dinyatakan fakta-fakta yang menjadi sandaran. Ini menyebabkan mahkamah perbicaraan tidak

mendapat gambaran jelas tentang kausa-kausa tindakan dan fakta yang menjadi sandaran, terutamanya apabila pihak-pihak sendiri mempertikaikan apa yang telah diplidkan. Hakim bicara perlu mengambil kira kesemua pliding secara objektif dan tidak boleh dijangka untuk menolak sebahagian lagi secara umum dan menumpukan perhatian kepada bahagian-bahagian lain yang sesuai dengan maksud satu pihak atau yang lain (lihat perenggan 16–18).

(2) Dalam mengemukakan sama ada responden pertama sepatutnya telah diberikan amaran mengenai penggunaan Cytotec, perayu memohon mahkamah ini untuk membayangkan responden pertama memberikan nasihat kepada si mati. Itu adalah spekulasi dan ia bukan untuk mahkamah membayangkan apa jua hipotesis. Sebaliknya pertimbangan mahkamah adalah terhad kepada pertimbangan keterangan yang dikemukakan (lihat perenggan 20).

(3) Hakim bicara berhak membuat dapatan bahawa tidak terdapat bukti mengenai apa-apa risiko material yang dikaitkan dengan penggunaan Cytotec untuk induksi bersalin. Terdapat bukti yang bercanggah sama ada terdapat apa-apa risiko material, dan hakim bicara selepas mendengar saksi-saksi, telah membuat dapatannya. Adalah menjadi satu campur tangan bidang kuasa mahkamah bicara untuk mengubah dapatan tersebut melainkan jika boleh dibuktikan bahawa dapatan adalah bercanggah dengan fakta yang tidak dipertikaikan atau keterangan, yang mana perayu-perayu telah gagal untuk berbuat sedemikian (lihat perenggan 21).

(4) Dapatan hakim bicara mengenai perkara kehilangan darah juga berdasarkan keterangan bercanggah di hadapannya. Hakim bicara telah mengambil kira fakta-fakta, keterangan mengenai fakta-fakta yang dipertikaikan dan hujahan sebelum membuat dapatan tersebut. Tiada kesilapan material yang akan menjamin campur tangan untuk memperbetulkan ketidakadilan (lihat perenggan 23).

(5) Tiada kecacatan nyata dalam pertimbangan dan pemikiran hakim bicara mengenai persoalan sama ada punca kematian adalah embolisma cecair amnion atau pendarahan selepas bersalin yang menunjukkan dapatan bahawa beliau terkhilaf (lihat perenggan 24).

(6) Walaupun responden kedua telah didakwa atas alasan bahawa ia telah gagal untuk menyediakan standard perkhidmatan yang dijangka daripada sebuah hospital swasta, tidak ada bukti mana-mana piawaian yang dikemukakan untuk membolehkan penentuan yang adil dan saksama mengenai standard perkhidmatan dan perkhidmatan hospital swasta yang diterima (lihat perenggan 25–26).]

Notes

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1217–1245.

Legislation referred to

Limitation Act 1953

Appeal from: Civil Suit No S2–22–212 of 2002 (High Court, Kuala Lumpur)

Americk Sidhu (Jerry Long and Sharmini Navaratnam with him) (Americk Sidhu) for the appellants.
Darryl Goon (Maidzuara Mohamed and Charlaine Chin with him) (Raja, Darryl & Loh) for the first respondent.
Dinesh Bhaskaran (K Navindran with him) (Shearn Delamore & Co) for the second respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

INTRODUCTION

[1] The appelants are the husband and children of Mdm Hoh Pau Yu ('the deceased'), an advocate and solicitor, who died in the hospital operated by Gleneagles Hospital (KL) Sdn Bhd ('the second defendant') almost eight hours after a child-birth attended to by the first defendant Dr Michael Samy. He is the consultant obstetrician and gynaecologist having his practice in the second defendant.

[2] The causes of action relied upon are founded in the tort of negligence for breach of a duty of care, and in breach of contract in the treatment afforded to the deceased whilst in their care, with a further claim that Gleneagles are vicariously liable.

[3] The facts of the case may be summed up briefly as follows.

[4] Having symptoms of labour, the deceased was admitted to the labour ward of the Gleneagles Hospital on 4 November 2000 in the afternoon.

[5] Until about 7.20pm there was no progress. She was examined by Dr Michael Samy. He suggested induction or augmentation of her labour. The deceased agreed. Dr Michael Samy inserted 100 mcg of a drug known as cytotec into the deceased's vagina to act as an induction agent and left her to proceed with labour.

[6] At about 1am on 5 November 2000, Dr Michael Samy decided to hasten

the process of labour by artificially rupturing the amniotic fluid sac. According to Dr Michael Samy, at this point he inserted a further 50 mcg of cytotec. Delivery occurred one hour 15 minutes later. The deceased suffered greater than average degree of blood loss. Her uterus would not contract sufficiently. Continued blood loss between the period after delivery and 4am caused her to collapse, resulting in her being transferred to the intensive care unit for resuscitation after which she was transferred for an emergency hysterectomy to the operating theatre where she remained until her eventual demise at 9.10am that morning.

[7] At the end of a trial, the plaintiffs' claim was dismissed with costs to be taxed. The plaintiff's appealed to this court.

THE DECISION OF THE HIGH COURT

[8] The conclusions of the High Court may be summed up broadly as follows:

(a) the plaintiffs departed from the pleadings;

(b) the plaintiffs failed to prove their case as pleaded, that the death was caused by post partum haemorrhage in the course of induction or excessive bleeding due to a uterine tear;

(c) the plaintiffs have failed to establish that Dr Michael Samy ought to have warned the deceased of any material risk of using cytotec;

(d) the plaintiffs have failed to establish that Gleneagles Hospital had breached the applicable standard of care for private hospitals in Malaysia; and

(e) that Gleneagles Hospital is not vicariously liable for Dr Michael Samy's acts and omissions, even if he was negligent.

OUR FINDINGS

[9] It had been pleaded at para 18 of the statement of claim that:

> The deceased underwent the induction on or about 1920 hours on the 4.7.2000. In the course of the induction the deceased suffered massive post partum haemorrhage causing the deceased's demise. Alternatively, the deceased suffered excessive bleeding due to a uterine tear, which led to the deceased's demise.

[10] It was submitted that para 18 was a general paragraph and ought not have led to pedantry on the argument that the plea was defective because one

could not be said suffer post partum haemorrhage in the course of an induction because 'by definition', PPH is after delivery and induction is before delivery.

[11] It was submitted:

> 28. This is a rather simplistic approach to the issue at hand. It is a fact that the drug Cytotec was used by Dr. Michael Samy to induce/augment labour. It is a fact that this drug causes the uterus to contract so that the birth process is accelerated. It is also a fact that the effects of this drug do not suddenly cease once birth is achieved but continue until the body breaks down the chemical in that drug. Therefore, even after the 'induction' period, the drug is still working.
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> 29. Where is the line to be drawn between the end of labour and the beginning of the post partum era? There is no doubt Pau Yu was found to be bleeding after birth. When did this bleeding begin? It must have been a contemporaneous event with the birth, (if not before), and the induction thereof. That is only logical.

[12] Blame was then put upon the other party:

> 30. If the use of the phrase 'in the course of induction the deceased suffered massive PPH' resulted in any feigned confusion on the part of the 1st Defendants, then surely it was open to the 1st (and 2nd) Defendants to seek clarification by asking for further and better particulars as provided for by virtue of the provisions of Order 18 rule 12 of the RHC 1980. The Defendants had 9 years to do this but did not take advantage of these provisions. Perhaps they were not as perplexed by paragraph 18 as they had made out. This was never supposed to have been a trial by ambush.

[13] The submissions turned to the trial judge:

> 31. Had the Learned Judge of the High Court addressed her mind to the host of other particulars pleaded, inter-alia, at page 13 (a to t), of the Statement of Claim, (TAB 2), perhaps the Learned Judge would have appreciated the precise allegations made against Dr. Michael Samy and could quite easily have come to a completely different conclusion.
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> 32. Unfortunately, the Learned Judge does not appear to have even considered the pleadings in toto as has been clearly manifested in her written judgment. There appears to be a complete absence of any form of scrutiny of the multitude of allegations against the Defendants as particularized in the rest of the statement of claim. This alone warrants a revisit of the entire matter and an appropriate analysis of the Plaintiffs pleadings in relation to the evidence produced.

[14] That such argument should emerge in submissions at all is unfortunate. It should not have arisen. In our view, it arose because the pleadings had not been written to disclose clearly and systematically, as is to be expected in professional negligence involving facts requiring professional expertise, the facts for the respective causes of action relied upon. Instead of setting out the

causes of action relied upon distinctly, and under each cause of action setting out the facts relied upon, the pleadings were set out like a story leading to a claim. Whilst this may be acceptable in straightforward cases, in technical or professional negligence cases, it is not. Counsel for the other party may not be able to advice his client properly. Though the technical or professional aspects may be familiar to the client, the client may not appreciate what his counsel needs to know.

[15] In this case, there are clearly questions to be put to the expert witnesses before the trial court, where the trial judge had the opportunity, if necessary, to ask further questions so as to have a clear understanding of the facts. We cannot over-stress the importance for the parties to set out the causes of action and the facts relied upon thereon clearly, so that disputed facts can be identified clearly not only between the parties but also to the trial court, so that the right questions can be put to the witnesses produced.

[16] While pleadings must be read as a whole, it is no excuse, given the period of six years allowed by the Limitation Act, not to put together in a well prepared action the evidence and the facts, and in the pleadings not to set out clearly the causes of action and the facts relied upon in each cause of action. Contrary to the purpose of pleadings, particularly in cases involving professional negligence and matters, the failure to satisfy these basic elements leads to the conclusion there seems to be a tendency to play one's cards close to one's chest. It is certainly the more liberal conclusion to the alternative that the writer of the pleadings is incompetent.

[17] Be that as it may, such stratagems unfortunately lead to the trial court not being able to have a clear appreciation of the causes of action and the facts relied upon when the parties themselves dispute what was pleaded, let alone the facts and evidence relied upon. It is no answer that it is the defendant who is seeking to confuse the issues or that the defendant did not ask for clarification, if the trial court is left unclear. It is upon the party upon whom the burden of proof rests to make his case as clearly as possible, starting from the pleadings, the facts, the evidence in relation to facts relating to scientific, technical and professional issues, and in the submissions.

[18] For obvious reason that judges cannot be expected to be as familiar with scientific, technical and professional matters and their facts as judges are with the law; they cannot be expected to sort out the grain from the chaff by themselves to make your bread. The trial judge must consider all of the pleadings objectively and not dismiss some parts as mere generalities and concentrate on other parts as suits the purposes of one party or another.

[19] The learned judge, therefore, did not err in not downplaying para 18 of the statement of claim.

[20] The submissions for the appelants on whether warning ought to be given on the use of cytotec began with seeking this court to imagine the first defendant giving advice to the deceased. We need not go into the details. It is not for any court to imagine upon any hypothesis. That is speculation. A court's consideration of findings to be made on a disputed fact is confined to an appreciation of the evidence adduced thereon to hold whether the party upon whom any burden of proof lies has discharged that burden. Argument may persuade when there is evidence to be weighed, but cannot replace evidence.

[21] The submissions for the appelants described the finding of the trial judge that in the year 2000, there is no evidence of any material risk associated with the use of cytotec for induction/augmentation of labour, as bizarre. It was a matter that was disputed, and there were conflicting evidence. The fact was disputed. The learned judge having heard the witnesses, was entitled to make the finding that she had. It would be an interference with the jurisdiction of the trial court for this court to alter that finding unless it is shown that the finding to be in contradiction of an undisputed fact or evidence. That, the appelant has failed to do.

[22] Likewise, the subject of blood loss. It was submitted:

> 50. The Learned Judge also found as a fact that there was: '… no evidence of any massive blood loss except for the postulation by Dr. Lim'.
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> 51. The Learned Judge further attempted to fortify her findings on this issue by relying on the following: …
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> 52. The Learned Judge went on to 'debunk' Dr. Lim's (PW2) 'postulations' that there must have been continuous bleeding and an accumulation of blood in the uterus or vagina for a variety of reasons.
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> 53. In other words, between the Defendants' submissions and the judgment of the Learned Judge, the impression created is that the Plaintiffs have made unsubstantiated allegations that Pau Yu had been bleeding profusely as there is absolutely no evidence to support this.
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> 54. What everyone has failed to ask themselves is one fundamentally important question: 'WHERE DID ALL THIS BLOOD COME FROM THEN???'

[23] The submission for the appelants then proceeded to argue the case for the appelants as to the cause of the bleeding. Yet again these are findings of fact which was dealt with in the examination, cross-examination and re-examination of expert witnesses before the trial judge. Counsel had the opportunity to put the questions clearly and adduce evidence before the trial

judge to discharge the burden of proof resting upon them. The submissions sought the learned judge to make a finding on the conflicting evidence before her. The trial judge considered the facts, the evidence on the disputed facts and the submissions and made her findings. We find no material error as would warrant our intervention to correct an injustice.

[24] The question whether the cause of death was amniotic fluid embolism ('AFE') or post partum haemorrhage (PPH). The former is important for the appelants' case. The difference between the two conditions was explained by Prof Derek Tuffnell ('PW3'). Again the fact is disputed. The evidence was inconclusive as to whether it was more likely one or the other. The learned trial judge had to make a finding thereon not so much by a display of argument and medical knowledge, but by an assessment of the weight to be given to the expert and other witness testimony before her. We find no obvious flaw in the consideration and reasoning by the trial judge as would warrant a finding that she had erred.

GLENEAGLES LIABILITY

[25] Gleneagles has been sued by the second defendant on the ground it had failed to provide the standard of services expected of a private hospital.

[26] There is, however, no evidence to enable a fair and just determination of what is the accepted standard of services and facilities of a private hospital. Such standard can be expected to vary according to the level a private hospital pegs itself to. There is, however, no evidence of any standards.

OUR CONCLUSION

[27] Having examined the grounds of decision and compared it against the pleadings, the evidence adduced and the submissions made, we can find no fault in her appreciation of the pleadings, evidence and submissions and the reasoning leading to her conclusion and decision.

Appeal dismissed.

Reported by Kohila Nesan